No. 95-1340

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

HUGHES AIRCRAFT COMPANY

Petitioner,

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER

Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

Pursuant to Supreme Court Rule 37.2, *amici curiae* Chamber of Commerce of the United States of America and Aerospace Industries Association of America, Inc. urge the Court to grant Hughes Aircraft Company's ("Hughes") petition for a writ of certiorari filed in this case. This brief is filed with the consent of both Petitioner and Respondent

INTERESTS OF THE AMICI CURIAE

The **Chamber of Commerce of the United States of America** ("the Chamber") is the nation's largest federation of business organizations and individuals, representing more than 220,000 companies, many of which provide goods and services to the United States under government contracts. The Chamber also represents several thousand trade and professional associations, and state and local chambers of

commerce. Ninety-three percent of the Chamber's members are businesses with fewer than 100 employees, and seventy-one percent have fewer than ten employees.

As the principal voice of the American business community, the Chamber regularly represents the interests of its members in court on issues of national concern. As in this case, the Chamber seeks to ensure that federal laws affecting the business community are interpreted and applied fairly and consistently throughout the nation's lower courts.

The **Aerospace Industries Association of America, Inc.** ("AIA") is a national, non-profit trade association representing manufacturers of commercial, military and business aircraft, helicopters, aircraft engines, missiles, spacecraft, and related components and equipment. AIA is comprised of forty-nine member companies, including many of the nation's largest corporations. Virtually all of AIA's members provide goods and services under contracts with the federal government, many deriving a significant portion of their business from such contracts.

Many of *amici's* members who perform government contracts have been affected by the False Claims Act ("FCA") Amendments of 1986 ("1986 Amendments"), Pub. L. No. 99-562, 100 Stat. 3153, 31 U.S.C. §§ 3729, *et seq*. The 1986 Amendments stimulated a substantial increase in the number of *qui tam* actions brought by individuals (or "relators"), who are empowered to bring actions on behalf of the government against government contractors who submit false claims to the government. Since 1986, AIA members have been named in over sixty FCA actions, including more than thirty *qui tam* actions.

While the FCA allows the government to investigate the relator's allegations and to intervene in the action (31 U.S.C. § 3730(b)(2)), in the vast majority of cases, the government

has declined to intervene.1/ When the government declines to intervene, the relator's action has been subject to a jurisdictional limitation. Prior to the 1986 Amendments, the relator's action was barred if it was based on information already known to the government. 31 U.S.C. § 3730(b)(4) (1985). Under the 1986 Amendments, the government's prior knowledge no longer bars the relator's action. Rather, the action is barred if it is based upon the "public disclosure" of allegations or transactions in a criminal or civil action, administrative hearing, report, audit or investigation, or in the news media, unless the relator is an "original source" of the information. 31 U.S.C. § 3730(e)(4)(A).

Hughes' petition raises two questions, on which the circuits are split, concerning relators' rights to maintain *qui tam* actions after the government declines intervention: (1) whether the FCA's amended jurisdiction provision applies retroactively to pre-amendment conduct, and (2) whether the amendment bars a *qui tam* action that is based upon a government audit report which is disclosed by the government to the contractor's employees and which is available to the public under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

These questions are of critical importance to members of the Chamber and AIA. The numerous cases declined by the government but pursued by relators have exposed the Chamber's and AIA's members to substantial potential

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1/ From FY 1987 through FY 1995, 1,105 qui tam actions were filed. The government intervened in only 189 cases, and declined intervention in 672 cases. Department of Justice *Qui Tam* Statistics, printed in 64 Fed. Contracts Rpt. 348-49, 362 (BNA Oct. 23, 1995). Presumably, the other 244 *qui tam* actions were still under seal as of October 1995.

liability. Many of these cases turn on the retroactivity issue and the definition of "public disclosure."[2/]

In the case at issue, the Ninth Circuit held that the government's disclosure of an audit report to a contractor is not a "public disclosure" serving to bar a *qui tam* action based on the audit report. This decision is particularly troublesome to the Chamber and AIA. Their contractor members are routinely audited by the government, and the audit reports are frequently disclosed to the contractors and circulated among their employees. The decision permits an employee to maintain a *qui tam* action even though he has no knowledge of wrongdoing except that which he learned from the government audit. The decision threatens an escalation of such "parasitic" *qui tam* actions in the Ninth Circuit.

Cases pursued solely by *qui tam* relators have imposed substantial direct costs and other burdens on member contractors, including interference with performance of the contracts at issue, payment of costs and attorneys' fees, and negative publicity attendant to being sued in the name of the United States. At the same time, these non-government cases have produced minimal, if any, financial recovery for the United States.[3/] *Amici* believe that the generally

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2/ Since a *qui tam* action may be filed in any judicial district in which the defendant "can be found, resides, transacts business, or in which any act proscribed by [the FCA] occurred" (31 U.S.C. § 3732(a)), many of the Chamber's and AIA's members who transact business in multiple locations will be adversely affected by relators forum shopping as a result of the circuits' split.

3/ Recoveries have occurred in only 31 cases in which the government declined intervention. This represents less than 5% of the 672 cases where the government chose not to intervene; the $15.6 million recovered in these 31 cases is less than 1% of the government's total recoveries under the FCA since FY 1987. *See, supra, n.1.* Contractors have incurred far more costs in

(Footnote cont'd on next page)

counterproductive consequences of *qui tam* litigation stem from the constitutional defects in the FCA noted in Hughes' petition -- the encroachment on the Executive Branch's prosecutorial discretion by a private, self-appointed party acting under the guise of governmental authority who has no personal injury-in-fact.[4/]

Resolution of these issues concerning relators' rights to maintain *qui tam* actions will directly and substantially affect other *qui tam* actions currently pending against *amici's* members, as well as future actions. For these reasons, the petition for certiorari should be granted.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD RESOLVE THE SPLIT OVER RETROACTIVE APPLICATION OF THE FCA'S JURISDICTION PROVISION.

This Court's decision in *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1501 (1994), affirmed that a statute is presumed to operate only prospectively absent clear Congressional intent to the contrary. Nevertheless, *Landgraf's* retroactivity principles have left the lower courts struggling with the temporal reach of many federal statutes. Applying *Landgraf's* retroactivity analysis has proved

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successfully defending such actions, and those costs, in many cases, are later passed on to the government through reimbursement of allowable overhead expenses as provided for in the Federal Acquisition Regulations (48 C.F.R. § 31.205-47).

4/ The Chamber and AIA endorse Hughes' position that the *qui tam* provisions of the FCA are unconstitutional and request that the Court address that issue. The principal focus of this brief, however, are the aforementioned questions of statutory application and interpretation.

particularly difficult in cases, like this one, involving jurisdictional statutes.

Here, the Ninth Circuit incorrectly held that there is a "strong presumption that jurisdictional statutes apply retrospectively." 63 F.3d at 1517. The court applied the FCA's amended jurisdictional bar retrospectively, holding that doing so did not infringe on Hughes' substantive rights. *Id.* In direct contrast, as discussed in Hughes' petition, the Sixth Circuit held in *United States v. TRW, Inc.*, 4 F.3d 417, 422 (6th Cir. 1993), *cert denied*, 114 S. Ct. 1370 (1994), that the amendment could not be applied retroactively because it expanded the circumstances under which *qui tam* actions could be brought.

This Court should grant the petition to resolve this conflict and to provide the lower courts with much needed guidance, clarifying that jurisdictional provisions that change the legal consequences of past conduct may not be applied retroactively absent congressional intent, and that statutory application is governed by the conduct that will be affected by the new law, not the date on which the action was filed.

A. The Retroactivity Question Has Precedential Value To Other Pending FCA Cases.

A decision by this Court on whether the amended jurisdiction provision applies retroactively to pre-amendment conduct will control several pending *qui tam* actions in which the government declined intervention. These actions are barred under the pre-1986 FCA because of the government's prior knowledge of the allegations, but are not barred under the 1986 Amendment because the allegations had not been publicly disclosed prior to the filing of the action.

In *Hyatt v. Northrop Corp.*, Nos. 94-55638, 94-55578, 1996 U.S. App. LEXIS 7464 (9th Cir. April 11, 1996), the government acquired the information upon which the action was based, and the relator filed the complaint, before the 1986 Amendments were enacted. After declining intervention, the government filed an *amicus curiae* brief

recommending dismissal under the pre-1986 provision. On appeal from the district court's dismissal, the Ninth Circuit reversed, stating that its decision in the instant case compelled retroactive application of the 1986 jurisdiction provision.

In *Boisvert v. FMC Corp.*, No. C-86-20613, 1987 U.S. Dist. LEXIS 13549 (N.D. Cal. Sept. 8, 1987), another action filed prior to the 1986 Amendment, the district court held that by permitting an action that previously would have been barred, the amendment impaired FMC's substantive rights. The court therefore held that the pre-1986 government knowledge jurisdictional standard applied, resulting in 20 of the 32 claims being dismissed. The decisions here and in *Hyatt* could spawn attempts to resurrect those claims.

In *United States ex rel. Newsham v. Lockheed Missiles and Space Company, Inc.*, 907 F. Supp. 1349 (N.D. Cal. 1995), the relator disclosed to the government in 1984 allegations of false charging of labor hours, but waited until 1988 to file her action. Lockheed moved under the pre-1986 jurisdiction provision for dismissal of the allegations that were previously known to the government. The district court denied Lockheed's motion, and the Ninth Circuit denied Lockheed's petition for a writ of mandamus. The case is pending in district court.

In *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 700 (1996), the relator disclosed his allegations to the government in 1988, more than a year before filing his suit. Because the defendant's challenged conduct occurred before 1986, the district court held that the pre-1986 FCA applied and dismissed the action upon concluding that the government had knowledge of the allegations one year prior to the filing of the action. The Ninth Circuit reversed, holding that the 1986 Amendment applied because the government did not obtain its knowledge until after the 1986 Amendments were enacted. The case is pending.

As these cases demonstrate, there is a pressing need to resolve the question of retroactive application with respect to jurisdictional limitations on *qui tam* actions.

B. Circuits Are Split On The Proper Application Of Landgraf's Retroactivity Principles.

The petition is an ideal vehicle for further elaboration of *Landgraf's* retroactivity principles. As the following cases demonstrate, the appellate courts are divided over whether jurisdictional and procedural rules that change the legal consequences of past conduct may be applied retroactively absent such direction by Congress.

1. Circuits Are Split On The Legal Consequences Of Past Conduct.

In *Chenault v. U.S. Postal Service*, 37 F.3d 535, 539 (9th Cir. 1994), the Ninth Circuit correctly noted that, "[r]egardless of whether a statute is 'substantive' or 'procedural,' it may not apply to cases pending at the time of enactment if the new statute would prejudice the rights of one of the parties." *Id.* Because the extension of the time for filing discrimination claims against the government would have increased the defendant's liability by forcing it "to defend against an action that was previously time-barred," the court held that § 114 of the Civil Rights Act of 1991 may not be retroactively applied in that case. *Id.* The Tenth Circuit has reached the same conclusion.5/

In *Maitland v. University of Minnesota*, 43 F.3d 357 (8th Cir. 1994), the Eighth Circuit held that § 108 of the Civil Rights Act of 1991 could not be applied retroactively to bar

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5/ *Million v. Frank*, 47 F.3d 385, 389-90 (10th Cir. 1995) (no retroactive application where defendant would have been "force[d] to defend an action previously time-barred").

the plaintiff's claims.6/ Pursuant to § 108, a person who is given notice of, and an opportunity to participate in, proceedings leading to judicial approval of a settlement of an employment discrimination claim may not challenge the employment practices that are within the scope of the approved settlement. At the time Maitland participated in the consent decree hearings, his participation in the proceedings would not have barred his cause of action for employment discrimination. The Eighth Circuit correctly refused to apply § 108 because to do so retroactively would impair rights a party had when he/she acted and attach new legal consequences to events completed before its enactment. *Id.* at 362-363 (citing *Landgraf*).

Therefore, the Eighth and Tenth Circuits, as well at least one panel of the Ninth Circuit, have found that, pursuant to *Landgraf*, statutes that extinguish a cause of action that was viable under prior law or revive a previously barred claim have impermissible "retroactive effect." Those courts recognize that statutes -- even if they are jurisdictional or procedural in nature -- may not be applied retroactively if they change the legal consequences of past conduct.

In contrast, the D.C. Circuit and other panels of the Ninth Circuit have eviscerated the traditional presumption against retroactive application of statutes. As evident from the cases discussed below, *Landgraf's* general statements that (1) jurisdictional provisions "usually 'take away no substantive right'" and (2) "[p]resent law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties," 114 S. Ct. at 1502 (emphasis added), have been misinterpreted by some courts. Despite *Landgraf's* statement

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6/ *Accord, Rafferty v. City of Youngstown*, 54 F.3d 27, 281 n.2 (6th Cir. 1995) ("we agree with the court in *Maitland* . . . that section 108 is not to be applied retroactively.")

that it "do[es] not restrict the presumption against statutory retroactivity to cases involving 'vested rights,'" 114 S. Ct. at 1502 n.29, those courts have incorrectly drawn an artificial line between substantive and procedural rules in determining retroactivity.

In *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402 (9th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3518 (U.S. Mar. 26, 1996) (No. 95-1167) (denying relator's *cert.* petition appealing from adverse judgment on the merits), for example, the Ninth Circuit departed from *Chenault* and permitted the 1986 Amendments to revive previously barred claims. The court stated that the government's prior knowledge of the alleged false claims was "simply a jurisdictional defense" to an FCA action. 61 F.3d at 1408. Hence, because it did not alter the defendant's underlying liability for alleged commission of fraud, the court held that the amended jurisdictional provision was properly applied retroactively. *Id.* Subsequently, in *Schumer*, the Ninth Circuit held that "[b]ecause the amendment does not infringe on the substantive rights of the defendant, it does not rebut the presumption of retrospective application of jurisdictional provisions." 63 F.3d at 1517.

In *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 923 (1995), the court stated, in *dicta*, that the Foreign Sovereign Immunity Act of 1976, which codified the "restrictive" theory of sovereign immunity that took hold in 1952, applies to pre-1952 events. The court stated that, under *Landgraf*, the FSIA does not have "genuine[] retroactive effect." 26 F.3d at 1170. The court concluded that the jurisdictional provision does not affect substantive rights and thus may be applied retroactively. The court failed to recognize that the expectation of immunity that prevailed prior to 1952 amounts to an antecedent right, thus distinguishing *Princz* from the jurisdictional cases cited in *Landgraf*, which merely affected the power of the courts or the propriety of injunctive relief, not the past rights or obligations of the parties.

2. Circuits Are Split On The Legal Consequences Of When The Claim Is Filed.

Some lower courts have also improperly focused on the date the suit was filed as opposed to the impact the statute has on pre-enactment conduct. In *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 988 (10th Cir. 1996), the court held that the damages provision in the Civil Rights Act of 1991 could not be applied retroactively because the action was filed before the effective date of the Act. The ruling implied that the presumption against the retroactive application is restricted to cases filed before the effective date of a statute. *See also, Craig v. O'Leary*, 870 F. Supp. 1007, 1010 (D. Colo. 1994) (where action is filed *after* the date of the Civil Rights Act of 1991, "the remedies permitted under the 1991 Act apply regardless of when the conduct giving rise to them occurred"). In contrast, in *Theard v. Glaxo, Inc.*, 47 F.3d 676 (4th Cir. 1995), the court held that section 101 of the Civil Rights Act of 1991 "does not apply to cases in which the conduct occurred before [enactment], regardless of when the claim was filed."

In sum, the *Landgraf* test has been applied inconsistently, often erroneously. The circuits disagree over whether statutory provisions that affect the rights and obligations of the parties, although couched in jurisdictional terms, may be retroactively applied. Circuits also disagree over the more basic question of whether the time of filing a suit is relevant to the retroactivity analysis.

The retroactivity holding below is contrary not only to the Sixth Circuit's decision in *United States v. TRW, Inc.*, but to other circuits' application of *Landgraf*. To foster fair, uniform application of the FCA and other federal statutes, this Court should provide needed guidance on the retroactivity principles in *Landgraf*.

II. COURTS ARE DIVIDED OVER THE MEANING OF THE FCA'S AMENDED JURISDICTIONAL BAR.

As discussed in Hughes' petition, the Circuits are divided on the meaning of the term "public disclosure" as used in the amended jurisdictional bar. Hughes argued below that a government audit report, containing allegations of wrongdoing by the contractor, that is disclosed by the government to employees of the contractor who were unaware of the alleged wrongdoing, constitutes a "public disclosure." That principle is squarely supported by a decision of the Second Circuit, *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992). However, the Ninth Circuit disagreed with Hughes' characterization, creating a split which, if left unresolved, will open the door to *qui tam* actions in the Ninth Circuit that would be barred elsewhere.

In addition, other circuits have held that a government document that is "available" or "potentially accessible" to the public is considered to be publicly disclosed under the FCA even if no one has actually sought to obtain the document.[7/] Hughes asserts that since a government audit report is accessible to members of the public under the Freedom of Information Act, the jurisdictional bar should be applied whenever the government has prepared an audit report. In contrast to the other circuits' broad interpretation, the Ninth Circuit held here that a government audit report cannot be considered a "public disclosure" until it is actually obtained by a member of the public. 63 F.3d at 1520.

7/ *United States ex rel. Kreindler et al. v. United Technologies Corp.*, 985 F.2d 1148, 1158 (2d Cir.), *cert. denied*, 113 S. Ct. 2962 (1993); *United States ex rel. Stinson, et al. v. Prudential Ins. Co.*, 944 F.2d 1149, 1159 (3d Cir. 1991); *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 20 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 1312 (1991).

The Ninth Circuit misconstrued the purpose of the jurisdictional bar and Congress' reasons for amending the provision, as well as the statute's plain language which does not preclude contractor employees from being considered members of the public.

A. Congress Intended To Bar *Qui Tam* Actions When The Government Has Already Commenced Visible Enforcement Efforts.

The pre-1986 bar against *qui tam* actions that were "based upon evidence or information the Government had when the action was brought" (31 U.S.C. § 3730(b)(4) (1985)) afforded nearly complete deference to the exercise of the government's enforcement discretion. In 1986, Congress expressed dissatisfaction with cases in which the government possessed information supporting a FCA case but appeared to have taken no action upon it. As a result, Congress intended less deference to government enforcement by barring *qui tam* actions only when the government already has decided to bring suit or pursue an administrative remedy, or has decided not to bring any action, provided the subject allegations have been publicly disclosed. The amendment was not intended to promote parasitic suits, but rather to permit citizen enforcement when the government has taken no visible enforcement measures.[8/]

The Ninth Circuit misinterpreted this purpose. In addressing the Second Circuit's holding in *Doe*, which held that any disclosure of allegations by the government to members of the public with no prior knowledge thereof,

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8/ "The Committee recognizes the validity of the reasons for enactment of the [jurisdictional bar]. Nevertheless, the Committee is concerned that there are instances in which the Government knew of the information that was the basis of the qui tam suit, but in which the Government took no action." H.R. Rep. No. 660, 99th Cong., 2d Sess. 22-23 (1986) (statement of Rep. Berman).

including employees of the defendant company, constitutes a public disclosure, the Ninth Circuit stated:

> Contrary to Congress' intentions for the jurisdictional bar, the *Doe* rule "effectively shifts the standard from 'public disclosure' back to 'government investigation,'" so that government possession of information relating to fraud effectively forecloses *qui tam* suits.

63 *F.3d at* 1519 (*citing the dissent in Doe*, 960 F.2d at 326). The Ninth Circuit thus overlooked the fact that Congress was concerned primarily with the situation in which the government possessed information but did nothing, *i.e.*, conducted no investigation and took no enforcement steps whatsoever.[9/] The pre-1986 law permitted that situation because the standard was mere "government knowledge," not government "investigation," as the Ninth Circuit incorrectly stated. The legislative history suggests that if the pre-1986 law had ensured that the government actually conduct an investigation before a *qui tam* action could be barred, Congress would have been satisfied.

The instant case is hardly one of government inaction, much less government inaction in secret. Here, before the relator did anything, the government had already engaged in extensive enforcement efforts by conducting an administrative audit and temporarily withholding $15.4 million in payments to Hughes. The government's enforcement efforts were clearly disseminated and known

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9/ "We must prevent suits from being dismissed simply by the Government's assertion that the Government already had the information brought forward by the plaintiff in order to ensure that the Government is indeed acting on that information." *False Claims Act Amendments, 1986: Hearings Before the Subcomm. on Admin. Law and Government Relations of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 95 (statement of Rep. Berman).

outside the government, not only to employees of Hughes, but also to its prime contractor, Northrop Corporation, which had no part in the alleged wrongdoing. Because of the government's action in actually exercising its enforcement discretion, and the visibility of that action outside the government, this is precisely the kind of case Congress left to the prosecutorial discretion of the government to the exclusion of *qui tam* enforcement.

B. The Ninth Circuit's Decision Invites "Parasitic" Actions That Congress Sought To Bar.

In amending the FCA in 1986, Congress sought to encourage actions by whistleblowers "who bring . . . wrongdoing to light." But Congress also wanted to limit "parasitic" suits by opportunistic plaintiffs whose actions contribute nothing to enforcement efforts already taken by the government.[10/] The Ninth Circuit lost sight of this second purpose. Hughes asserted below that to allow a *qui tam* action based on a government audit that was distributed throughout a company would result in a *qui tam* action whenever an audit contains adverse findings. The court did not weigh that concern appropriately or realistically.

First, the court feared that application of the jurisdictional bar in this case would "drastically curtai[l] the ability of insiders to bring suit once the government becomes involved in the matter." 63 F.3d at 1519. Yet that is precisely the purpose of the jurisdictional bar -- to bar private enforcement efforts that come after the government has commenced its own actual enforcement effort.[11/] *Wang ex*

10/ S.Rep. No. 345, 99th Cong., 2d Sess. 14, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266, 5279 (hereafter "Senate Report").

11/ The history of Congress' and courts' efforts to deal with parasitic *qui tam* actions is described in *United States ex rel. Stinson, et al. v. Prudential Ins. Co.*, 944 F.2d at 1162-68.

rel. United States v. FMC Corp., 975 F.2d 1412, 1419 (9th Cir. 1992) ("A 'whistleblower' sounds the alarm; he does not echo it. The Act rewards those brave enough to speak in the face of a 'conspiracy of silence,' not their mimics."). A *qui tam* relator who merely mimics the government's own findings not only adds nothing to the government's enforcement efforts, he may interfere with those efforts and, because he is entitled to share in the government's recovery, reduce the amount received by the Treasury.

The Ninth Circuit was unmoved by the threat of a dramatic increase in *qui tam* actions copied from government audit reports, since "any such effect would be limited to a single lawsuit in each instance." 63 F.3d at 1519. This is little comfort, however, in view of the thousands of audits released annually. Congress could not have intended the result which the Ninth Circuit finds untroubling -- that anyone who sees an audit report can use it as the basis for a *qui tam* action, as long as he or she is the first one to do so.

C. The Ninth Circuit's Definition Of "Public Disclosure" Conflicts With The FCA's Language.

1. A Government Audit Report Is One Of The Express Means By Which A Public Disclosure Occurs.

The jurisdictional bar specifically identifies a government audit as one of the documents or contexts in which allegations can be publicly disclosed. DoD's Defense Contract Audit Agency ("DCAA") "routinely provides copies of draft reports for all audits . . . to the contractor being audited for review and comment." DCAA Audit Manual § 10-212.2 (1996). Congress must have been aware of such routine disclosures when it included audit reports as

one of the express examples of how a "public disclosure" occurs.12/

In addition to the government's affirmative release, audit reports are also routinely available to other members of the public through the FOIA. The DCAA's FOIA regulations state: "It is the policy of DCAA to: (a) Promote public trust by making the maximum amount of information available to the public, upon request, pertaining to the operation and activities of the Agency." 32 C.F.R. § 290.4. The regulations also describe the procedures for requesting and obtaining audit reports. *Id.* at § 290.7. Congress must have known also of the FOIA presumption in favor of public disclosure of audit reports.

The decisions noted in Hughes' petition that have broadly interpreted the FCA's jurisdictional bar as barring actions based on information that is "available" or "accessible" to the public support Hughes' assertion that audit reports available under FOIA may not be the basis of a *qui tam* action, in contrast to the Ninth Circuit's holding in the instant case that an audit is publicly disclosed under FOIA only when it is actually requested and released. 63 F.3d at 1520. This court should resolve that issue consistent with Congress' desire to limit *qui tam* actions when the government has taken action through the process of conducting and making publicly available an administrative audit.

12/ While the Audit Manual in effect in 1986 does not state that such disclosures are "routine," it notes that disclosure is subject to the contracting officer's approval. § 10-213.3 (1983).

2. Contractor Employees Are Not Exempt From Being Considered Members Of The Public.

The Ninth Circuit interpreted the term "public disclosure" so as to exclude contractor employees as members of the public. 63 F.3d at 1518-19. This exclusion is nowhere found in the statute; it conflicts with decisions of other circuits, as noted in Hughes' petition, and it rests on the fallacy that defense contractor employees are uniquely inclined to suppress fraud.

In *Doe*, the Second Circuit held that public disclosure occurred when federal investigators arrived at the defendant's offices with a search warrant and informed employees they were investigating allegations of fraudulent overcharging under defense contracts. 960 F.2d at 319-20. *Doe* held that "[o]nce allegations of fraud are revealed to members of the public with no prior knowledge thereof, the government can no longer throw a cloak of secrecy around the allegations," *i.e.*, a public disclosure has occurred. *Id.* at 323.

The Ninth Circuit ruled that accepting a contractor's employees as members of the public was "unrealistic" because: (a) employees are inclined to protect the information from outsiders, thereby limiting "the potential for corrective action presented by other forms of disclosure;" and (b) the government and its contractors "operate within a closed loop of secrecy" such that information disclosed between them stays "within a private sphere." 63 F.3d at 1518. These generalities find no support in the statute, however.

The FCA does not expressly or impliedly exempt contractor employees from status as members of the public. Indeed, the opposite conclusion fits the scheme of the legislation. Congress, focusing primarily on defense procurement fraud, expressly identified an audit as one vehicle of public disclosure, knowing that audits are routinely disclosed by the government to the audited contractor (and perhaps to its prime contractor, as was done here). The effect of the Ninth Circuit's analysis is to create

an implied exception for the most common way that government audits are released outside the government. The lower court's speculation about the behavior of contractor employees is insufficient to justify this departure from a plain reading of the FCA, a reading that is consistent with the realities of government audit disclosure.

In any event, the panel's assumptions about contractor employees being part of a "closed loop of secrecy" are unfounded. There is nothing peculiar about government contracting that fosters keeping illegal conduct secret. Since Congress must have presumed that most *qui tam* actions would be filed by contractors' employees,[13/] the panel's apparent disregard of their role is especially misplaced. Had Congress shared the court's view, it would have enacted a vastly different statute.

The court's fear that the Second Circuit's interpretation of "public disclosure" would allow a conspiracy of silence is therefore misplaced. *Doe*'s holding that the disclosure was "public" because it was made to "innocent employees" who were "strangers to the fraud" implements the core rationale of the *qui tam* provisions, whereas the Ninth Circuit ultimately second-guesses and overrides that rationale.

Here, the record describes a lengthy audit process involving scores of people from Hughes, Northrop and the government. The "closed loop of secrecy" that the panel feared simply did not and could not have existed; therefore, neither did the need, or statutory justification, for a *qui tam* action.

13/ Senate Report, p. 5269-70. Of the 33 reported *qui tam* cases within the Ninth Circuit, 24 were filed by employees of the defendant. The Ninth Circuit even noted that such cases are the "paradigm *qui tam* case." *United States ex rel. Fine v. Chevron*, 72 F.3d 740, 742 (9th Cir. 1995) (*en banc*).

CONCLUSION

For the foregoing reasons, the Chamber and AIA urge the Court to grant Hughes' petition for certiorari.

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